

ARBITRATION ADVISORY

02-01

IMPOSITION OF SANCTIONS BY ARBITRATORS IN CONDUCTING FEE ARBITRATION MATTERS

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INTRODUCTION

This arbitration advisory discusses whether it is permissible for an arbitrator to impose sanctions in mandatory fee arbitration matters when faced with egregious or unethical behavior by the parties during the course of the proceedings. The conclusion, in a nutshell, is that with regard to imposing monetary sanctions for misconduct you can't, you shouldn't, so don't do it.

Non-monetary procedural sanctions are permissible, but they should only be imposed with the utmost discretion against a party as a last resort to achieve fairness in the proceedings in the face of that party's wilful and/or repeated disregard of procedural requirements, including an arbitrator's ruling.

DISCUSSION

Lack Of Authority To Impose Monetary Sanctions

The imposition of monetary sanctions normally occurs when there is specific authority given to the arbitrator. The Mandatory Fee Arbitration Program was created under the authority of the California State Bar Act, the Business and Professions Code, and the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs ("Minimum Standards"). There is nothing in the California State Bar Act, the Business and Professions Code, or the Minimum Standards specifically

authorizing the imposition of monetary sanctions in fee arbitration proceedings.

Business and Professions Code 6200 provides that the Board of Governors "shall, by rule, establish, maintain and administer a system and procedure for the arbitration" of fees and costs charged for professional services by members of the State Bar [Bus. & Prof. Code §6200(a)]. Pursuant to this authority the Board is, in essence, the rule-making body and its authority extends to mandatory fee arbitration programs sponsored by local bar associations. The rules of procedure for the arbitration of fee disputes promulgated by local bar associations are subject to Board approval to ensure their compliance with statutory requirements and the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs.

Business and Professions Code section 6200, subsection (g) sets forth the powers granted to arbitrators, including taking and hearing evidence, administering oaths and affirmations, and compelling, by subpoena, the attendance of witnesses or the production of documents. However, it contains no authority for the imposition of sanctions.

Business and Professions Code section 6203, subsection (a) provides that the award shall be in writing and signed by the arbitrator. It expressly states that the award may not include any award to either party for costs or attorney's fees incurred in preparation for or in the course of the fee arbitration proceedings, even if there is a contract provision between the parties providing for such an award of costs or attorney's fees [See also Bus. & Prof. Code §6203(c)]. The statutes expressly defer that type of recovery to judicial proceedings for confirming, correcting, or vacating the award or following a trial *de novo* [See Bus. & Prof. Code §§ 6203(a), 6203(c) and 6204(d)]. A fee arbitrator is permitted to allocate the filing fee between the parties as the arbitrator deems proper [Bus. & Prof. Code § 6203(a)]. Here again, there is no provision or authority for the arbitrator to award monetary sanctions.

In a mandatory fee arbitration hearing, although evidence of malpractice and professional misconduct must be admitted to the extent such evidence bears upon the amount in dispute, an arbitrator is specifically prohibited from awarding affirmative relief in the case of claims of malpractice or professional misconduct [Bus. & Prof. Code §6203(a)]. Here again, the authority extended to the arbitrator is very narrowly defined. There is no provision or authority for the arbitrator to award monetary sanctions based on such evidence.

While Business and Professions Code section 6203, subsection (b) specifically incorporates the general arbitration provisions of the Code of Civil Procedure by reference, that incorporation is limited to the provisions regarding confirming, correcting, or vacating an award and for the service of process of documents related thereto. Therefore, to the extent that there may be authority for the imposition of sanctions by

arbitrators in other types of arbitration proceedings, it has not been made applicable to mandatory fee arbitration proceedings.

In conclusion, there is no direct authority in the mandatory fee arbitration statutes and regulations authorizing a fee arbitrator to impose monetary sanctions against any participant for any reason, and certainly no such authority exists by implication.

**Procedural Sanctions Are Permissible,
But Should Be Imposed Only As A Last Resort To Achieve Fairness**

The foregoing should not be confused with the authority of an arbitrator to impose procedural sanctions, such as the exclusion of evidence, for violating a rule of procedure or an arbitrator's pre-hearing order. For example, if prior to the hearing, the arbitrator issues an order requiring the parties to exchange documents by a certain date and it is determined that one of the parties did not comply with that order and unreasonably failed to exchange the documents, it would be permissible for the arbitrator to issue a sanction excluding that party's documents from evidence at the hearing.

Similarly, if an arbitrator were to rule that the parties exchange witness lists before the hearing and, at the time of the hearing, it is determined that a particular witness had not been previously disclosed, it might be appropriate under some circumstances to issue a sanction excluding that witness's testimony. Some local rules expressly authorize the exclusion of evidence for violations of procedural rules.

Even in a situation where an arbitrator issues a pre-hearing ruling and that ruling is disobeyed (e.g., a failure to exchange documents), the only permissible sanction would be to exclude those documents from being entered into evidence. It would not be proper to impose any other type of sanction or punishment against the offending party such as monetary sanctions or a default sanction such as striking a response or excluding a party from the hearing.

The mandatory fee arbitration program does not provide for a default sanction against a party for his or her failure to respond or participate. The Guidelines and Minimum Standards provide that the hearing will proceed as scheduled and a decision will be made on the basis of the evidence presented irrespective of an attorney's failure to respond or refusal to participate [Guidelines and Minimum Standards, Sect. II, para. 3]. The decision may not be based on the attorney-party's nonappearance. By implication, a sanction excluding either party's testimony for non-compliance with procedural requirements would run counter to the Guidelines and Minimum Standards' proscription against basing a decision on default.

Despite the availability of certain non-monetary procedural sanctions, an

arbitrator should impose such sanctions against a party only as a last resort to achieve fairness in the proceedings after less onerous measures to alleviate any unfairness have been considered. For example, the arbitrator might continue a hearing to another date to accommodate a late exchange of documents or adjourn the hearing to a later time the same day to give the other party time to review belatedly disclosed documents.

CONCLUSION

A sanction is, in reality, a penalty or punishment. Therefore, any act on the part of the arbitrator which would amount to a punishment or penalty for egregious or unethical conduct is, by definition, a sanction. There is no express authority in the mandatory fee arbitration statutory or regulatory scheme for the imposition of monetary sanctions by a fee arbitrator.

If the arbitrator finds that a party's conduct during the arbitration proceeding is egregious, unethical or disruptive, he or she should attempt to control the proceedings to finish the hearing.¹ As a result of such conduct, however, an arbitrator lacks the authority to impose monetary sanctions or to exclude the testimony of a party at the hearing or to render an award based on the party's conduct during the arbitration proceedings or based on the party's default.

On the other hand, a party's wilful disobedience of the arbitration procedural requirements, such as a wilful failure to comply with an arbitrator's pre-hearing ruling to exchange documents or to disclose witness' names, may prejudice the other party to such an extent that non-monetary sanctions may be appropriate. However, the imposition of procedural sanctions is within the sound discretion of the arbitrator and should be considered only after less onerous alternatives to alleviate any unfairness, such as continuing the hearing, have been considered.

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¹ As another option, when possible professional misconduct is disclosed in an arbitration hearing, the arbitrator or program may refer the matter to the State Bar's Office of Intake without violating the confidentiality afforded by Business & Professions Code section 6202 [Guidelines and Minimum Standards, Sect. II, para. 4].